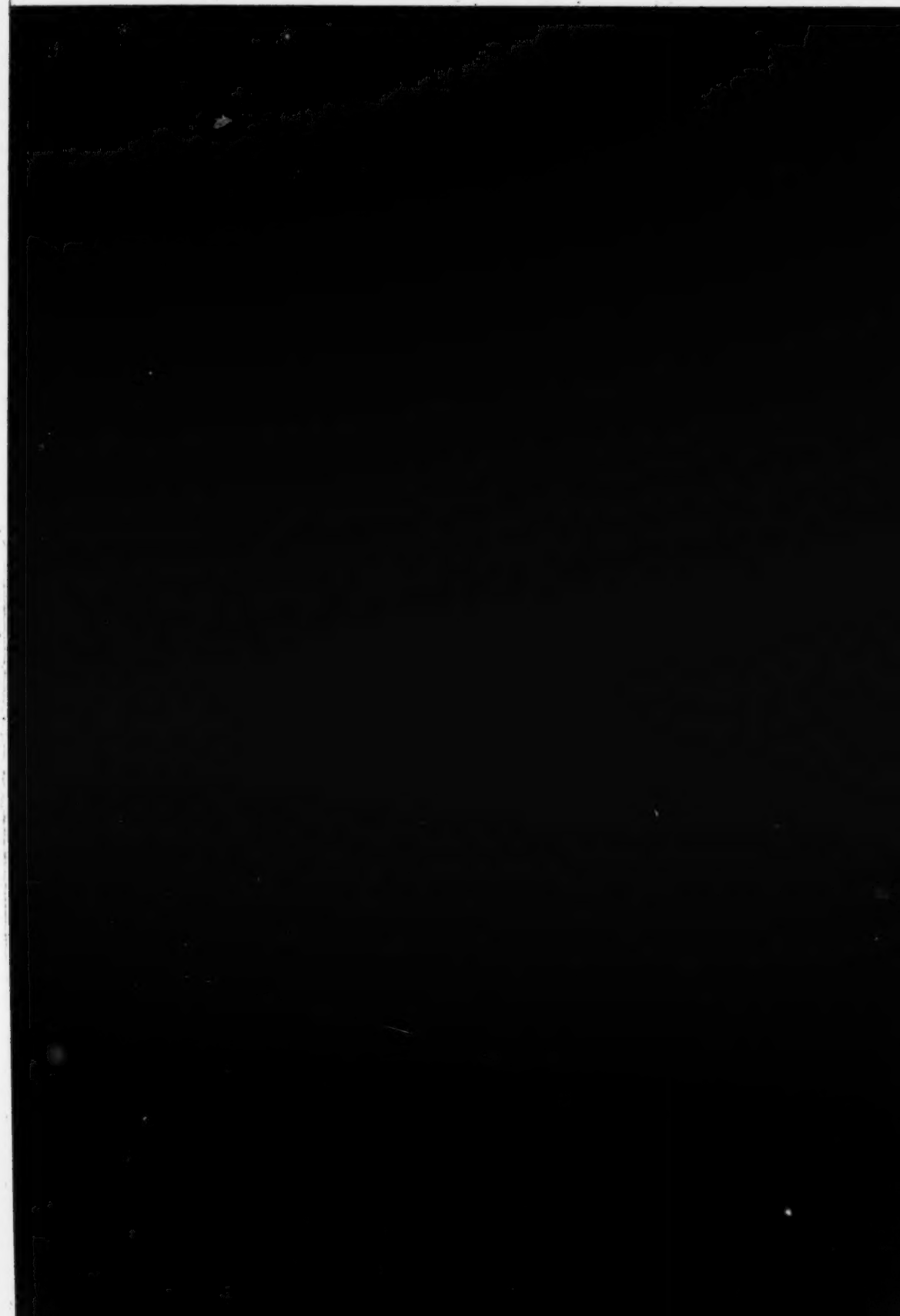

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233-880—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 323

BOOKS INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–8) is reported at 358 F. 2d 935.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9) was filed on April 12, 1966, and a petition for rehearing was denied on May 11, 1966. On June 6, 1966, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to July 10, 1966, and the petition was filed on July 8. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient.

2. Whether the trial court's instructions were proper.

3. Whether the trial court erred in denying admission of the allegedly comparable materials offered by petitioner.

STATEMENT

Petitioner, a Rhode Island corporation engaged in the wholesale distribution of paperback books, was convicted on one count of causing the transportation in commerce from Rhode Island to Massachusetts, for the purpose of sale and distribution, of more than two copies of an obscene book, in violation of 18 U.S.C. 1465. Petitioner was fined fifteen hundred dollars.

The book upon which the conviction was based is entitled *Lust Job,* by Tony Calvano. As described by the court of appeals (358 F. 2d at 936–937; Pet. App. 2–3), the book:

> * * * set forth, in the form of a novel, a tale exclusively devoted to the sexual adventures of its principal characters. Adulteries, seductions, and orgies are the only events of importance. The contacts described include not only sexual intercourse, but sodomy and other perversions. There is not any serious effort to portray the reality of cultural or social conditions of even the most neurotic or sordid portion of the population. Description of the locale is minimal. The style is flaccid, repetitive, and unreflective of the author's individuality.
>
> On the front cover of the book is an unclothed woman, her back toward the reader. She is seated on the floor, her back and but-

tocks showing, her head tilted backwards and her arms clasping below the knees the trousers of a clothed man. The title *Lust Job* is printed so that it crosses the woman's back. Above the woman's head and across the man's trousers are the words "He climbed to the top on a ladder of sin." On the rear cover appears the following description of the book:

"SELFISH PASSIONS * * *

drove Steve Rapallo, a handsome, eager young executive as he clawed his way up the lust ladder to success. Success in money and bed, the only two things that seemed to matter. And to hell with the way he got them. Take Carol—which he did—the wanton wife of his boss, whose only desire was to get between the sheets and stay there. And Rapallo was just the chamber stud she needed. It was a ball, and it was Miami Beach and it was the annual convention. A time for fun. A time for sin. A time for shame and lust and everything that added up to wild bedroom orgies where nobody cared what anybody did as long as they did it and never stopped!

* * * GUTTER LOVE!"[1]

[1] In addition to the foregoing, the book also contained, immediately following the text, a list of "[o]ther Night-stand books you will enjoy," including *Love Addict*, *Lust Club*, *Sex Gang*, *Gang Girl*, *Campus Tramp*, *Carnival of Lust*, *The Wild Night*, *Summertime Affair*, *Party Girl*, *Born for Sin*, *The Adulterers*, *Naked Holiday*, *Sin Girls*, *No Longer a Virgin*, *Passion School*, *Sin on Wheels*, *Sin Hotel*, *Miami Call Girl*, *The Sin Damned*, *Passion Trap*, *The Girl Upstairs*, *Lesbian Love*, *Sex Jungle*, *The Lustful One*, and *The Wife Swappers* (A.A. 106). ("A.A." refers to petitioner's appendix in the court of appeals; "G.A." refers to the government's appendix in that court; "Tr." refers to the trial transcript; "D.R.I." refers to petitioner's requested instructions at trial.)

The government's evidence showed that one Irving F. Ephraim, a retail bookseller in Worcester, Massachusetts, entered into an "automatic plan" with petitioner, whereby the latter would, on its own initiative, send him books of its own choosing (Tr. 16–17). On or about May 30, 1962, Ephraim received from petitioner, in accordance with this plan, a carton of paperback books, thirty-five of which were copies of *Lust Job* (Tr. 22–32, 40–41, 46, 50–56, 65–66).[2] The government completed its direct case by submission of the book to the jury.

Petitioner presented, as literary experts, two assistant professors of English literature, who testified that the book was poor literature but, in their opinion, not legally obscene. Both offered, as the basis for this conclusion, their opinion that, judged against current literature with which they were familiar, the book did not offend community standards. One stated that the dominant theme of the book was the "advocating of moral responsibility and the leading of a moral life" (Tr. 140). The other testified that the dominant theme of the book was "that sexual promiscuity erodes one's personality" (Tr. 178), and he found "this element of condemnation of sexual behavior" to be its

[2] The invoice accompanying the carton identified *Lust Job* only by number and not by name. Ephraim testified that upon receipt of cartons of this type of material, he would verify only the total copies in the carton against the invoice and not the total copies of each identification number listed thereon, because "[t]his is not books. Books are entirely different. These are paperbacks" (Tr. 42).

"redeeming quality" (Tr. 196).[3] Petitioner also sought to offer copies of various magazines and books into evidence as probative of community standards, but the trial judge refused to admit the material.

The trial judge, in denying a motion for a new trial, found the book to be "clearly and totally without any literary value or any social importance" and held "that the jury was well warranted in finding that the dominant theme of the book is an appeal to the prurient interest of the average person and that it goes beyond all acceptable standards of candor in its representation of and treatment of sexual matters" (A.A. 119–120). The court of appeals held that "there was adequate evidence in the text of the novel, without any reference to the covers, to warrant a factual determination that the dominant theme of the book taken as a whole appeals to a prurient interest in sex, that the book is patently offensive because it affronts contemporary community standards relating to the description of sexual matters, and that the material is utterly without redeeming social value" (358 F. 2d

[3] Both witnesses were asked on cross-examination, over the objection of petitioner, whether in their opinion the description of the book appearing on the rear cover was indicative of its dominant theme. One witness acknowledged that the description advocated the opposite of moral responsibility (Tr. 150), but asserted that such items have no bearing on the dominant theme of books because they "are usually written by someone in the publishing house and not by the author himself" (Tr. 148) and are used as "a kind of attractive lure in order to get someone to buy the text" (Tr. 149). The other acknowledged that "clearly blurbs are put on covers of books to induce sales" (Tr. 202), but also asserted that they do not indicate the dominant theme of a book because they are the product of the publisher and not of the author (Tr. 203).

at 937; Pet. App. 4). Additionally, the court of appeals held that it could "take into account the front and back covers of *Lust Job* and from them * * * reach a conclusion that there was pandering and an exploitation of interests in titillation" (358 F. 2d at 938; Pet. App. 5) and "that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values" (358 F. 2d at 938; Pet. App. 6).

ARGUMENT

1. There is no occasion for this Court to review the sufficiency of the evidence in this case. As in *Ginsburg* v. *United States*, 383 U.S. 463, 471, the evidence shows that petitioner was engaged in the "business of pandering to 'the widespread weakness for titillation by pornography'" and that the book in issue here was knowingly and purposefully "sold [by petitioner] as stock in trade of the sordid business of pandering" (*id.* at 467). That the purpose of the distribution of the book was pandering is, we believe, demonstrated by its text, by its mode of presentation (*i.e.*, the promotional matter on its front and back covers and on the first inside page) and by the list, appearing after the text, of other books published under the same imprint.

In addition, there was evidence from which the jury could infer that petitioner had knowledge or notice of the contents of the text and of the mode of presentation. The book was shipped by petitioner to the retailer in the regular course of business under an arrangement by which petitioner selected the books to send the retailer. The books in the shipment were

identified only by number and not by title, and, according to the retailer's testimony, were all fungible paperbacks with no independent literary standing as "books." The book in issue here was published as one of a line of books whose titles proclaim them to be "sex novels." From this evidence, we submit, the jury could reasonably infer that petitioner was in the business of wholesaling "sex novels" of the *Last Job* type, and that someone in authority in the corporation must have had knowledge or notice of the character of books appearing under the "Nightstand" imprint and of their mode of presentation to the reading public. If there was some other explanation for petitioner's shipment of this book to Ephraim—for example, that petitioner had acquired copies of it unknowingly from a publisher from whom petitioner usually obtained an entirely different type of book, and had transshipped the copies to Ephraim without examining them, or that the book was acquired and shipped by a subordinate employee who exceeded the scope of his authority—it was a matter peculiarly within petitioner's own knowledge, and petitioner therefore had the burden of coming forward with evidence in this regard. Compare *Edwards* v. *United States*, 334 F. 2d 360, 366 (C.A. 5), certiorari denied, 379 U.S. 1000.[4]

[4] There is no question presented in this case, as there is in *Redrup* v. *New York*, No. 3, this Term, and *Austin* v. *Kentucky*, No. 16, this Term, concerning the proof necessary to establish an individual's responsibility for or willful and knowing association with the activities of a business enterprise where his relationship is that of minor employee or non-managing owner. Moreover, those cases involve the retailing of

2. Petitioner asserts that the trial court committed error (a) by instructing, in regard to scienter, that the jury had to find only "that the defendant knew the contents of said book at the time of transportation of the same for sale or distribution" (G.A. 195); and by failing to instruct, as petitioner requested, (b) that "a work cannot be proscribed unless it is 'utterly' without social importance" and (c) that "[t]he average person, as construed and applied, must be the adult within the community."

a. The trial court's instruction on scienter was substantially that which petitioner requested (D.R.I. 9, A.A. 126; D.R.I. 21, A.A. 130). No challenge to this instruction was made below.

b. Although petitioner requested an instruction on social value (D.R.I. 40, A.A. 134–135), it neither objected to the trial court's failure to give the instruction (see Tr. of Charge to Jury, pp. 16–18), nor cited the failure as one of its grounds for moving for a new trial (see A.A. 107–110),[5] nor on appeal urged the failure as a ground for reversal (see App. Brief, pp. 55, 57–60). In our memorandum in *Aday* v. *United*

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books, whereas petitioner here is a wholesaler shown to have selected on its own initiative the books that it transported in commerce.

[5] In moving for a new trial, petitioner urged, on the basis of *Jacobellis* v. *Ohio*, 378 U.S. 184, that "[t]he social value test is independent of the prurient interest test, and there is no warrant for weighing the quantum of social value against the quantum of prurient interest" (A.A. 111). The argument was made, however, in requesting the trial court to exercise its independent constitutional judgment and rule the book to be not obscene, and not in urging that the court had erred in failing to give the requested instruction on social value.

States, No. 149 this Term, we acknowledge that "an issue whether material has redeeming social value and was traded on the basis of that value is an important one in a prosecution of a defendant charged with the distribution of the material as obscenity" (p. 3), and suggest that because the opinion of the court of appeals "fails to consider the claim that the instructions to the jury were fatally defective under the standard enunciated in" *Memoirs* v. *Massachusetts,* 383 U.S. 413, "the appropriate disposition of the petition would be to remand the case to the court below for further consideration in the light of" that decision (p. 4). We consider the present case distinguishable. In view of petitioner's abandonment below of the issue of the proper instruction, the court of appeals had no opportunity to pass on that issue. Accordingly, we believe there is no occasion for a remand here.

c. While the trial court did not instruct, as petitioner requested, that the average person must be the adult within the community, it did instruct that the test (G.A. 196):

> is not whether [the book] would arouse lustful thoughts in those comprising a particular segment of our community, such as the young, the immature, or highly prudish, or, on the other hand, would leave another segment, such as the scientific or highly educated, or the so-called wordly-wise and sophisticated, indifferent and unmoved. The test is the effect of the book considered as a whole not upon any particular class, but upon all those it was likely to reach; in other words, its impact upon the average person in our national community in 1962.

As the court of appeals held, a jury of laymen would regard this instruction "as directing attention to the effect of the book upon a typical mature adult reader in the audience which [petitioner's] method of distribution of *Lust Job* sought to reach" (358 F. 2d at 939; Pet. App. 7).

3. The trial court properly denied admission to the allegedly comparable materials offered by petitioner. There is some question whether "community standards" is a "fact" to be proved. As Mr. Justice Brennan noted in his opinion in *Jacobellis* v. *Ohio*, 378 U.S. 184, 192–193, the concept of "contemporary community standards" was introduced into the law of obscenity in the opinion of Judge Learned Hand in *United States* v. *Kennerley*, 209 Fed. 119, 121 (S.D.N.Y.). There and in *United States* v. *Levine*, 83 F. 2d 156, 157 (C.A. 2), Judge Hand made clear that a jury is to apply such standards in the same manner that a negligence jury applies the tort standard of care—on the basis of experience and general knowledge rather than on the basis of evidence concerning the conduct of others in like circumstances.

But, in any event, this issue is not presented here. Clearly, we believe, a work is not relevant to demonstrate the non-obscenity of another work unless both are substantially similar and the offered work is not obscene. *Womack* v. *United States*, 294 F. 2d 204, 206 (C.A.D.C.). Petitioner made no showing of similarity here. And, as the court of appeals noted (358 F. 2d at 939; Pet. App. 8), "it is not true that every item sold is necessarily not obscene. Hence, not every book sold in the market is admissible to

test the obscenity of" a book named in an obscenity indictment. See, also, *United States* v. *West Coast News Company,* 357 F. 2d 855, 860–861 (C.A. 6), petition for certiorari pending, *sub nom. Aday* v. *United States,* No. 149, this Term; *United States* v. *Oakley,* 290 F. 2d 517, 519 (C.A. 6), certiorari denied, 368 U.S. 888.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1966.

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* Petitioner claims, as an additional ground for the admissibility of the offered materials, that they would establish "the absence of unlawful knowledge and intent" on its part (Pet. 30). It is difficult, however, to perceive the bearing that materials distributed by others would have on the question whether or not petitioner distributed *this* book for the purpose of pandering to a weakness for pornographic titillation.

U.S. GOVERNMENT PRINTING OFFICE: 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

BOOKS, INC. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 323. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the First Circuit is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN concurs in the reversal on the basis of the reasoning set forth in his opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478.